No. 89-1344

(4)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ENSERCH EXPLORATION, INC., AS
MANAGING GENERAL PARTNER OF
EP OPERATING COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Enserch Exploration, Inc., as Managing General Partner of EP Operating Company ("EPO"), hereby submits this reply brief to the Brief of the Federal Energy Regulatory Commission ("Commission") in opposition to EPO's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

I. THE COURTS OF APPEALS HAVE GENERAL JURISDICTION TO REVIEW ORDERS IN WHICH THE AGENCY BELOW IS ALLEGED TO HAVE EXCEEDED ITS AUTHORITY.

The Commission's orders reopening Natural Gas Policy Act of 1978 ("NGPA") Title I determinations, in which the Commission purported to act under Section 503(d) of the NGPA, 15 U.S.C. § 3413(d), are subject to judicial review in the United States Courts of Appeals pursuant to the general review provision of the NGPA, Section 506(a)(4). 15 U.S.C. § 3416(a)(4). The Commission blurs the distinction between "determinations" of Title I category and "reopening" of *final* determinations. Commission Br. at 2, 10.[1]

The Commission's repeated citations to *Williston Basin Interstate Pipeline Co.* v. *FERC*, 816 F.2d 777 (D.C.Cir. 1987), *cert. denied*, 484 U.S. 1025 (1988), *Mesa Petroleum Co.* v. *FERC*, 688 F.2d 1014 (5th Cir. 1982) are inapposite, because neither of those cases involve reopening of a *final* determination under Section 503(d) of the

[1] The Commission's brief states that in the orders on review, the Commission "reopened its *review* of the *Texas Railroad Commission's* . . . determinations for 75 gas wells in the formation." Commission Br. at 2 (emphasis added). This sentence implies that the Commission's review of the Texas Railroad Commission's determinations was not complete. In fact, however, long before the Commission issued the orders on review, the Commission's review of the TRC's determinations had been completed. At the time the Commission reopened the well determinations in November 1988, those determinations had been "final" under the applicable provisions of the NGPA since 1986. Pet. App. 35a n.15.

NGPA; in both of those cases, the Courts of Appeals reviewed actions of the Commission *affirming* jurisdictional agency determinations under Section 503(b). The Fifth Circuit recognized the distinction between the initial determination that gas qualified for a certain price category and action to subsequently reopen that determination. The Fifth Circuit chided the Commission for misapplying the statute. Pet. App. 13a, n.10. However, the Fifth Circuit did not correct the Commission's error, finding that it lacked jurisdiction to do so.

The Commission now argues that "the general review provision [of the NGPA] may not trump the specific jurisdictional provision Congress enacted for particular Commission orders . . . under Section 503." Commission Br. at 11. The Commission misreads the NGPA, interpreting the statute in a manner inconsistent with basic principles of statutory construction and the legislative history of the NGPA. EPO Pet., 15-21.[2] Moreover, as a general matter, the Courts of Appeals have jurisdiction to review claims that an agency acted in excess of its statutory authority. The Commission reopened seventy-five tight formation well determinations based on an erroneous finding that EPO and the other Travis Peak well operators made "untrue statements of material fact" to the TRC. However, the Fifth Circuit found that there was no untrue statement of material fact. If EPO did not make an "untrue statement of material fact," then plainly the Commission had no basis under Section 503(d) upon which to reopen the seventy-five well determinations. Thus, the Commission exceeded its authority.

In *Leedom* v. *Kyne*, 358 U.S. 184 (1958), this Court held that the courts could review agency action on a con-

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[2] In general, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Abbot Laboratories v. Gardner, 387 U.S. 136, 140 (1967). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.*, at 141. *See also* Rusk v. Cort, 369 U.S. 367, 379-380 (1962); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

tention that the agency had exceeded its statutory authority, even if the enabling statute did not authorize judicial review. Specifically, this Court held that a Federal District court had jurisdiction to consider an original suit to set aside the National Labor Relations Board's determination that certain non-professional employees of Westinghouse Company could be included in a voluntary unincorporated labor organization of professional engineers for purposes of establishing a collective bargaining representative.[3]

The Federal District Court heard the suit on the complaint of the labor organization. The court found that it had jurisdiction and set aside the NLRB's determination of the bargaining unit. The NLRB appealed to the District of Columbia Circuit. The Board did not contest the District Court's conclusion that the NLRB had acted in excess of its powers and had injured the statutory rights of the professional employees. The Board contended only that the District Court lacked jurisdiction. However, the District of Columbia Circuit affirmed the District Court.

This Court affirmed the District Court and the District of Columbia Circuit, stating that "[t]his suit is not 'review,' in the sense of that term as used in the Act, of a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. 184, 189. This Court found this "right to sue" to exist generally under "the law," apart from the review provisions of the

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[3] Section 9(b)(1) of the National Labor Relations Act, 29 U.S.C. § 159(b)(1), provided that in determining the "unit" appropriate for collective bargaining purposes, "the board shall not . . . decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." Section 9(d) of the NLRA provided for judicial review of establishment of units only after the election had been held and the Board had ordered the employer to do something predicated on the results of the election.

NLRA. *Id.*, at 189. Of course, the NGPA contains a general review provision, which does not preclude judicial review of the Commission's Order. 15 U.S.C. § 3416(a)(4).

This Court "cannot lightly infer that congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. at 190, *citing* cf. *Harmon* v. *Brucker*, 355 U.S. 579 (1958); *Stark* v. *Wickard*, 321 U.S. 288 (1944); *School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902). The purpose of NGPA Section 503(d) is to ensure that the well determination procedure achieves finality expeditiously, thus achieving certainty for gas producers, all as part of an incentive to explore for and develop new gas reserves. Consistent with this objective, final determinations cannot be disturbed in the absence of concealment of relevant facts. Congress plainly intended "judicial protection" of this right conferred upon producers.

Further support for the proposition that appellate courts have jurisdiction to review agency orders that are challenged on the grounds that they exceed the agency's statutory authority is found in *Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978). In *TAPS*, this Court affirmed the jurisdiction of the courts of appeals to review orders issued by the Interstate Commerce Commission under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), suspending initial tariff schedules of an interstate carrier. This Court noted that in earlier decisions, it held that the appellate courts did not have jurisdiction to review ICC suspension orders. 436 U.S. at 638-639 n.17, *citing Arrow Transportation Company* v. *Southern Railway Company*, 372 U.S. 658 (1963); *United States* v. *SCRAP*, 412 U.S. 669 (1973). This Court distinguished *TAPS* on the grounds that it was not reviewing the ICC's evaluation of the "reasonableness" of the rates, but the authority of the ICC to suspend initial rates. This Court concluded that the Con-

gress did not intend to cut off judicial review of orders under the ICA for such "limited purposes." [4]

In *Abbot Laboratories*, this Court rejected contentions similar to those accepted by the Fifth Circuit below, that because the Federal Food, Drug, and Cosmetic Act included a specific procedure for judicial review of certain enumerated kinds of regulations not involved in that case, review of all other kinds was meant to be excluded. This Court rejected that analysis, finding instead that "we must go further and inquire whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review." 387 U.S. at 141. In looking to the overall legislative purpose, this Court found that at the time of enactment, it was recognized that the Declaratory Judgments Act provided an appropriate remedy in equity in cases where an administrative officer has exceeded his authority and there is no remedy of law.

This case presents a question similar to that presented by *Leedom*, *Abbot Laboratories* and *TAPS*. EPO does not ask the Court to determine whether the Commission appropriately applied the statutory tests for disturbing well category determinations. Of course, EPO asserts that the Commission erred in its application of Section 503(d); indeed, the Fifth Circuit has already stated that the Commission misapplied Section 503(d). EPO contends that the Fifth Circuit erred when it held that it could not review the Reopening Order, even to address EPO's contention that the Commission exceeded its authority under Section 503(d). If this Court finds that the courts of appeals have authority to review such questions, this Court should remand to the Fifth Circuit for further proceedings as are appropriate, given the Fifth

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[4] Dunlop v. Bachowski, 421 U.S. 560, 567 (1975) (appellate jurisdiction to review decision of the Secretary of Labor not to bring a civil action under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481, to set aside a union election); Abbot Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967).

Circuit's previous conclusion that the Commission has misapplied Section 503(d).

II. THE FIFTH CIRCUIT'S OPINION IS SQUARELY IN CONFLICT WITH OPINIONS OF THE DISTRICT OF COLUMBIA CIRCUIT.

The Commission strains to distinguish *ANR Pipeline Company* v. *FERC*, 870 F.2d 717 (D.C.Cir. 1989), and fails. Commission Br. at 12-13. *ANR* is in direct conflict with the Fifth Circuit's decision in this case. The fact that *ANR* affirms a Commission decision *not* to reopen a final well determination under NGPA Section 503(d) does not contradict the basic fact that the District of Columbia Circuit asserted its jurisdiction to review those Commission orders. Even if the *outcome* of the exercise of jurisdiction was affirmance of the orders below, the reviewing court obviously exercised its jurisdiction to review the orders. The Commission's alternative argument, that the District of Columbia Circuit simply "assumed," incorrectly, that it had jurisdiction in *ANR*, is contradicted by *Williston*. In *Williston*, the same court undertook a *sua sponte* analysis of its jurisdiction to review Commission orders under Section 503 affirming jurisdictional agency determinations. See EPO Pet. at 13 n.8; *Williston*, 816 F.2d at 781 n.78. That Court determined that it *lacked* jurisdiction and dismissed the petition for review. Thus, it is incorrect to "assume" that the District of Columbia Circuit exercised its jurisdiction unconsciously in *ANR*. That court knowingly asserted its jurisdiction under Section 506(a)(4) to review the Commission's orders. The Fifth Circuit did the opposite in this case.

III. THE FIFTH CIRCUIT'S HOLDING UNDERMINES THE INTEGRITY OF THE CATEGORY DETERMINATION PROVISIONS OF THE NGPA.

The practical consequences of this case are very real and potentially far-reaching, despite the Commission's attempts to trivialize this matter. The Commission states that it is reluctant to exercise its authority to reopen well determinations, yet in this case the Commission reopened

seventy-five determinations. EPO's lost revenues as a result of the Commission's actions reach into the tens of millions of dollars. The Commission cites "the unusual and obviously protracted history" of this case as a justification for reopening the determinations, but examination of the text of the order drawn upon (Pet. App. 77) shows that this consideration was the basis for the remand of the Travis Peak Formation determination to the TRC, not for the reopening of the individual well determinations. While it is certainly to be hoped that the decade-long designation process endured by producers operating in the Travis Peak Formation will not be a recurring phenomenon at the Commission, *this* case involves the reopening of final determinations involving individual wells, not the determination of the Travis Peak Formation as a "tight formation." Moreover, this case is not unique, as exemplified by *ANR* and *Mobil Oil Exploration & Producing Southeast Inc.*, 34 F.E.R.C. (CCH) Para. 61,211 (1986).

The Commission argues that the question presented is of "diminishing importance," due to the recent enactment of the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 102 Stat. 157 (1989). Under the 1989 Act, Congress repealed the remaining price and nonprice controls on producer sales of natural gas effective January 1, 1993. In addition, the 1989 Act provides for interim decontrol of gas sales under certain circumstances. As noted in EPO's petition (EPO Pet. at 14, n.9), the Commission solicited comments on the desirability of continuing the well determination process for gas that has been decontrolled, because of significant tax incentive implications, in a Notice of Proposed Rulemaking published December 18, 1989. Among other categories of gas, gas produced from tight formations qualifies for a tax credit for nonconventional fuels under Section 29 of the Internal Revenue Code, 26 U.S.C. 29(c)(1)(B). Since the filing of EPO's petition in this case, the Commission has issued a final rule on the 1989 Act. The Commission received comments from twenty-one parties regarding the

well determinations issue, all but one of which favored continuation of the determination process. In response to these comments, the Commission indicated that it will continue to process well determinations until January 1, 1993, "in order to allow producers to obtain tax credits that are dependent upon such determinations even if the gas has been otherwise decontrolled." *Order Implementing the Natural Gas Wellhead Decontrol Act of 1989*, 55 *Fed. Reg.* 17425, 17427 (April 25, 1990). Finally, the Commission suggests that the practical effect merely postpones review of the Commission's decision, because the Commission will not take any action on the reopened well determinations until after the TRC decides, on remand, whether the Travis Peak should be designated again as a tight formation. Commission Br. at 14 n.12. The Commission's contention ignores the legal issue presented by this case.

In the Reopening Order, the Commission suspended the running of the 150-day period for issuance of a final order,

> in order to permit Texas to reevaluate the character of the Travis Peak in accordance with the Commission's order remanding that proceeding. . . . The Commission also believes that the status of the subject wells is *entirely* dependent upon further action by Texas with regard to Travis Peak. Consequently, comments regarding the reopening of the subject determinations are unnecessary at this time . . . .

Pet. App. 57a-58a (emphasis added). In other words, the Commission's holding that EPO made an "untrue statement of material fact" could only be modified if the Commission determines that the Travis Peak Formation qualifies as tight formation. The issue of statutory construction raised by EPO is purely legal: whether the Commission properly construed Section 503(d) as permitting reopening and vacation of NGPA determinations based upon information (*i.e.*, the Commission's January 9, 1987 order vacating the Travis Peak tight formation designation) that did not become available until after

the determinations had become final. Cf. *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967) (agency rules constituted final agency action).

Moreover, the Commission's action is "pragmatic" in a final way. *Id.*, at 149-150. Whatever comments the Commission may be prepared to consider in response to the Reopening Order, the Commission has made it clear that it will not alter the result (*i.e.*, the Commission will vacate the final determinations) based upon comments urging the Commission to declare the well determinations final on the grounds that the determinations were not based upon any "untrue statement of material fact" arising out of the original Commission order designating the Travis Peak as a tight formation.

Thus, even though as a technical matter the Commission retains discretion to find that the well determinations may not be vacated even if the Travis Peak Formation is not determined on remand to be a tight formation, the Commission appears to have committed itself to vacating the well determinations in the event that the Travis Peak Formation is not determined to be a tight formation. *See* the Reopening Order, Pet. App. 57, quoted above, which states that the "status" (by which the Commission no doubt means "validity") of the well determinations depend "entirely" on "further action" by the Railroad Commission.

In addition, even though the Commission's regulations do not remove the right to collect the NGPA ceiling price applicable to tight formation gas until the well determinations are vacated, EPO's purchaser has withheld the price continuously. Although the Reopening Order did not "require[] an immediate and significant change in the [petitioner's] conduct of [its] affairs with serious penalties attached to noncompliance," *Abott Laboratories*, 387 U.S. at 153, it is nonetheless true that the maximum lawful ceiling price applicable to EPO's production from the affected wells is effectively cut in *half* by the Commission's action here.

The continuing uncertainty resulting from the Reopening Order has now stretched over several years. The Court held that "mere financial expense" is not a justification for pre-enforcement review.[5] However, in the context of an administrative action focused at particular parties that make significant changes in everyday business practices, financial expense can be considered as a factor weighing in favor of prompt review.

CONCLUSION

Wherefore, this Court should grant the petition to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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[5] Frothingham v. Mellon, 262 U.S. 447 (1923); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).